IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

TUESDAY, THE 11TH JULY 2006 / 20TH ASHADHA,1928

GTA.No. 1 of 2002

GTA.30/COCH/1991 of I.T.A.TRIBUNAL,COCHIN BENCH
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APPELANT

THE COMMISSIONER OF GIFT TAX, AAYAKAR BHAVAN,CALICUT.

BY ADV. SRI.P.K.R.MENON,SR.COUNSEL,GOI(TAXES)
SRI.GEORGE K. GEORGE, SC FOR IT

RESPONDENTS

SHRI M.A.UNNERRIKUTTY,CHEROOTY ROAD, CALICUT.

BY ADV. SRI.P.BALAKRISHNAN (E)

THIS GIFT TAX APPEAL HAVING BEEN FINALLY HEARD ON 11/07/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

C.N. RAMACHANDRAN NAIR &
K. M. JOSEPH, JJ.

G.T.A. 1 OF 2002

Dated this the 11th day of July, 2006

JUDGMENT

C.N. Ramachandran Nair, J

This Gift Tax Appeal filed by the Revenue is against the order of the tribunal holding that there is no gift involved in the transfer of land and building to the firm, M/s. Kalpaka Tourist Home of which the respondent assessee, his wife and children are the Partners. An extent of 56 cents of land and a building thereon originally belonged to the respondent assessee and his wife. The respondent had 5/6th share in the property. Even though the respondent/assessee and his wife claimed to have transferred the property to a Company formed by them by name M/s. Kalpaka Tourist Home (P) Ltd., the transfer was not recognised by the Department because no Conveyance Deed was executed or registered in favour of the Company. Accordingly, the property continued to be assessed in the

Wealth Tax Assessment in the name of the respondent/assessee. The challenge against the wealth tax assessment got confirmed before the statutory authorities, including this Court. While the wealth tax assessment in respect of he property continued to be made in the name of the respondent/assessee, the assessee along with his wife and children constituted a Partnership Deed dated 1.5.1981, by name M/s. Kalpaka Tourist Home. The firm is admittedly running a tourist home and allied activities and for the said purpose, the land and the building originally purported to have been transferred to the aforesaid Company, were in turn transferred to the Firm, by name Kalpaka Tourist Home. The case of the respondent is that the Company is the transferor and sale consideration is credited in the Books of the Company. However, the assessing authority under the Gift Tax Act, took the view that when the respondent/assessee and his wife brought the assets to the Firm and the value of the property is credited in the capital accounts of the partners, the same amounts to gift within the meaning of Section 2(xxiv)(b) of the

Gift Tax Act. Since the respondent/assessee retained 1/6th share in the Firm, the Gift Tax Officer treated the balance 5/6th share in the value of the property of the petitioner as a gift to the Firm. When this gift tax assessment was contested in appeal, the Commissioner of Gift Tax (Appeals) treated the transfer of the property as one made by the above company to the partnership firm and so much so, he cancelled the gift tax assessment of the respondent/assessee. While allowing the Appeal, he has also taken note of the inconsistent stand taken by the assessee that the value of the same land and building as welath in the name of the respondent/assessee for subsequent years. On further appeal, the tribunal observed that the Department has not challenged the finding of fact entered into by the first appellate authority, i.e. the transfer having effected by the Pvt. Ltd. Company to the Firm and treating this finding as conclusive, the tribunal dismissed the Department appeal after taking note of the wealth tax assessments of the respondent/assessee for subsequent years wherein the value of the land and building

involved were included. This Appeal is filed by the Revenue against the order of the tribunal.

2. We have heard the learned senior counsel Shri P.K. Ravindranatha Menon appearing for the appellant, and Shri P. Balakrishnan, learned counsel appearing for the respondent/assessee. Counsel for the appellant contended that the findings of the first appellate authority as well as the tribunal are absolutely illegal and arbitrary, if not perverse. We do not know how the first appellate authority and the tribunal can come to a conclusion that a Pvt. Ltd. Company can transfer the land and building in question to the firm, after conclusive finding by this Court in the wealth tax cases that the Company had never become the owner of the property as there was no valid transfer of ownership from the respondent/assessee and his wife to the Company. So long as the Company has not become the owner of the property, it cannot transfer the land and building in question to the Firm and the findings to the contra recorded by the two authorities below is palpably wrong. In fact, the only

question is whether there is a valid transfer of the land and building involved in this case by the respondent/assessee and his wife to the Firm justifying assessment with reference to Section 2(xxiv)(b) of the Gift Tax Act. This is not considered either by the first appellate authority or by the tribunal. This should have been done with reference to the relevant provisions of the Partnership Act, the income tax assessments and the Accounts of the partnership firm, namely Kalpaka Tourist Home. Since, by virtue of the conclusive findings by the Wealth Tax Authorities, including this Court that the transfer of land and building by the respondent/assessee in favour of the Company has not taken place, the respondent/assessee and his wife continued to be the owners of the property. If the owners of the property have allowed the land and building to become property of the Firm, which can happen either by execution of a Deed in favour of the Firm or by operation of Section 14 of the Partnership Act, 1932, then certainly there is a transfer amounting to gift by virtue of Section (xxiv)(b) of the Gift Tax Act. Since the two appellate

authorities have found that transfer was by the Pvt. Ltd. Company to the Firm which, to our mind, is absolutely incorrect, they had no occasion to consider whether there was a transfer of the assets by the respondent/assessee and his wife to the partnership firm. Admittedly, no transfer deed is executed by these two joint owners in favour of the Firm. Therefore, the only question to be considered is whether there was a transfer of the assets by the respondent/assessee and his wife to the partnership firm. If the owners of the property have allowed the land and building to be treated as assets of the Firm, which will be disclosed in the Accounts of the Firm, then the property is vested in the Firm by virtue of operation of of Section 14 of the Partnership Act, which is as follows:

> "14. The property of the firm - Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business.
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> Unless the contrary intention appears,

> property and rights and interests in property acquired with money belonging to the firm, are deemed to have been acquired for the firm."

3. A copy of the partnership deed produced before us does not show that the land and building is brought as original assets of the firm. However, as is seen from the above Section, even assets later acquired and brought become the assets of the Firm. Therefore, even at a later date, if the land and building were brought as assets of the Firm by crediting in the capital account of the partners, then it becomes the asset of the firm and so long as the original owners do not treat the entire value of the property theirs by crediting their capital account, there is a transfer within the meaning of Section 2(xxiv)(b) attracting gift tax. The only relevant finding so far as the issue in question on record, is that the Assessing Officer who has given a finding in the assessment order, though not with figures that the land and building stand credited in the capital account of the partners. Unfortunately, this finding in the assessment order which is the sole basis of the assessment, escaped the attention of the two

appellate authorities.

4. Even though the learned counsel appearing for the respondent/assessee contended that the Department cannot have conflicting views in the same matter and opposed the gift tax assessment on account of the consistent wealth tax assessment treating the asset as a wealth of the respondent/assessee, learned senior counsel for the Revenue relied on the decision of the Delhi High Court in Commissioner of Wealth Tax v. Meatles (P) Ltd. ((1885) 156 ITR 569) and contended that there can be no estoppel against a statute and the fact that wealth tax assessments were made including the wealth in the name of the respondent/assessee, the Department is not precluded from making gift tax assessment as and when the transfer came to the notice of the Department. We are of the view that the continued wealth tax assessments made without taking note of the transfer of assets by the respondent/assessee to the Firm do not stand in the way of making gift tax assessment, if the same is permissible under the statute. It would be open to the respondent/assessee to

contest the wealth tax assessment wrongly made after transfer of the asset to the Firm, if at all there is a transfer.

5. Learned counsel for the respondent contended that even if the assessee has an alternate contention that even if gift is sustained, the valuation of the gift is excessive and arbitrary, we find this issue is not considered by both the appellate authorities as in principle they found that no gift is involved in the transaction. In such circumstances, we set aside the order of the tribunal and since we find that both the appellate authorities committed the same error, we remand the matter to the Commissioner of Gift Tax (Appeals) for considering whether there was transfer of property by the respondent/assessee and his wife attracting gift under Section 2(xxiv)(b) of the Gift Tax Act, which should be considered with specific reference to the income tax assessments and accounts of the Firm and in the light of the observations above. The Commissioner should call for the assessment records of the Firm and if required, call for accounts from the respondent/assessee, peruse the same, hear

the Officer and respondent/assessee and pass orders in accordance with law within a period of three months from the date of receipt of a copy of this Judgment. It would be open to the respondent/assessee to challenge the wealth tax assessment, if gift tax assessment is sustained by the Commissioner of Gift Tax (Appeals).

The Gift Tax Appeal is disposed of as above.

C.N. RAMACHANDRAN NAIR, JUDGE

K.M. JOSEPH, JUDGE

kbk.

K. M. JOSEPH, J.

G.T.A. NO. 1 OF 2002

JUDGMENT

11th July, 2006